

No. 15533

United States
Court of Appeals
for the Ninth Circuit

BUILDERS CORPORATION OF AMERICA,
a Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California
Northern Division.

FILED

MAY 27 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MESSRS. LANDIS & BRODY,

ALVIN LANDIS,

926 J Building,

Sacramento 14, Calif.,

Attorneys for the Plaintiffs.

LLOYD H. BURKE,

United States Attorney;

MERVIN D. MORGENSTEIN,

Assistant U. S. Attorney,

422 Post Office Building,

San Francisco 1, Calif.,

Attorneys for the U. S.

In the United States District Court for the Northern District of California, Northern Division

Civil No. 7250

BUILDERS CORPORATION OF AMERICA,
a Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Count I

I.

This action is brought under the Federal Tort Claims Act, 28 U. S. C. 1346b, 2671 et seq.; and that the amount in dispute is in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, all of which hereinafter more fully appears.

II.

Plaintiff, Builders Corporation of America, is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office in the City of Beverly Hills, County of Los Angeles, State of California.

III.

Plaintiff, Herlong Sierra Homes, Inc., is a corporation organized and existing under and by virtue

of the laws of the State of Nevada, with its principal office in the City of Reno, County of Washoe, State of Nevada. Herlong Sierra Homes, Inc., is licensed to do business in the State of California.

IV.

The defendant, the United States of America, acting through the Department of Defense, owns, operates, and maintains a military installation known as the Sierra-Ordnance Depot.

V.

Said Sierra-Ordnance Depot is a Federal enclave and is located in the County of Lassen, State of California, in a desolate and isolated area. The nearest points of urban development to said Sierra-Ordnance Depot are the City of Susanville in Lassen County, California, approximately forty miles northwest from said Depot, and the City of Reno in Washoe County, Nevada, approximately fifty-six miles southeast from said Depot. The military and civilian personnel, all of whom are agents and employees of the defendant, United States of America, necessary to operate and maintain said Depot are quartered on or near said Depot.

VI.

That the negligent or wrongful acts or omissions occurred in said Lassen County, State of California, within the jurisdiction of the United States Court of the Northern Division, of the Northern District, as herein more fully appears.

VII.

That Colonel G. H. Leavitt, at all times mentioned herein, was the Commanding Officer of the Sierra-Ordinance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

VIII.

That Captain William K. Bouldin, at all times mentioned herein, was Assistant Post Engineer of said Sierra-Ordinance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

IX.

That Joseph H. Gill, at all times mentioned herein, was Executive Assistant of said Sierra-Ordinance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

X.

That Virgil Leigh, at all times mentioned herein, was a Civilian Personnel Officer of said Sierra-Ordinance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XI.

That Herbert A. Hoyt, at all times mentioned herein, was Assistant Supply Officer of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XII.

That C. Q. Johnson, at all times mentioned herein, was a Fiscal Officer of said Sierra-Ordnance Depot, residing on said Federal Enclave, and was a duly authorized agent and employee of the defendant, United States of America, acting within the scope of his office and employment.

XIII.

The Federal Housing Administration was created by the National Housing Act approved June 27, 1934 (48 Stat. 1246, 12 U.S.C. 1702), as amended, and it functions as a constituent agency of the Housing and Home Finance Agency pursuant to Reorganization Plan 3 of 1947. The purpose of the Federal Housing Administration is to encourage improvements in housing standards and conditions, to provide a system of mutual mortgage insurance, and to exert a stabilizing influence on the mortgage market. It provides insurance against loss on loans made by private lending institutions. The Federal Housing Administration is authorized, under Title VIII of the National Housing Act, as amended, to insure mortgages on rental housing built by private

enterprise on or near military reservations for the use of civilian and military personnel of the Armed Forces, on certification by the Secretary of Defense. The Federal Housing Administration is authorized, under Title IX of the said National Housing Act, as amended, to insure mortgages on programmed housing in critical defense areas, whether such housing is for sale to persons qualified under the provisions of said National Housing Act, as amended, or is constructed as a rental project for such persons. Under authority of the Act of August 8, 1949 (63 Stat. 570), said Federal Housing Administration was authorized to insure mortgages on mortgaged property designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force (including Government contractor employees) assigned to duty at the military installation at or in the area of which such property is constructed. Said Act further provides that no such mortgage shall be insured unless the Secretary of Defense, or his designee, shall have certified to the Commissioner of the Federal Housing Administration that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

XIV.

That the Federal National Mortgage Association was organized pursuant to the provisions of Title

III of the said National Housing Act, as amended, and was transferred to the Housing and Home Finance Agency as one of its constituent agencies by Reorganization Plan 22 of 1950, effective July 10, 1950, and becoming effective September 7, 1950. Said Federal National Mortgage Association is an agency of the defendant, United States of America, established by the Congress to provide a secondary market for mortgages insured by the Federal Housing Administration and is authorized to purchase, service, or sell any mortgages which are insured under the said National Housing Act, as amended. Said Federal National Mortgage Association provides credit to assist veterans and others eligible for such credit assistance under the provisions of said National Housing Act, as amended, and, as one of its authorized functions, purchases mortgages from mortgagees approved by the Federal Housing Administration.

XV.

The Housing and Home Finance Agency was established by the President's Reorganization Plan 3 of 1947, effective July 27, 1947, (12 Fed. Reg. 4981) and is an agency of the defendant, United States of America, responsible for guiding the activities of the defendant, United States of America, in the field of housing to accomplish the objectives set forth in the National Housing Act as amended.

XVI.

By reason of the isolated location of said Sierra-Ordnance Depot, the defendant, The United States

of America, acting through the Department of Defense, had constructed housing at said Sierra-Ordnance Depot for the use of civilian and military personnel of said Depot; that said housing was constructed for temporary use and had become inadequate for the purposes for which it had been constructed.

XVII.

On or about the 6th day of July, 1950, in accordance with the provisions of the National Housing Act, as amended, the said Department of Defense entered into negotiations with the Federal Housing Administration and the Housing and Home Finance Agency to obtain construction of four hundred fifty-six (456) dwelling units to adequately house civilian and military personnel employed at said Sierra-Ordnance Depot; that to induce the Federal Housing Administration to insure mortgages for such construction and thereby obtain private persons and private lending institutions who would be willing to undertake and contract to construct said dwelling units, the said Department of Defense represented to said Federal Housing Administration and to said Housing and Home Finance Agency that by reason of a substantial in-migration of defense workers and military personnel needed for the operation, maintenance, and fulfillment of the primary function of said Sierra-Ordnance Depot, there existed a shortage of housing facilities for said Sierra-Ordnance Depot which impeded or threatened to impede the operation of said Sierra-Ordnance Depot,

and that said Sierra-Ordinance Depot was a critical defense housing area; that the existing housing at said Sierra-Ordinance Depot utilized for the housing of military and civilian personnel was inadequate from the standpoint of space allowance, heating and plumbing facilities, and electrical outlets; that the kitchens and bedrooms of said existing houses lacked modern appliances; that seven hundred seventy (770) apartments of said existing houses used coal burning stoves for heating and coal ranges for cooking and water heating. It was further represented to said Federal Housing Administration and said Housing and Home Finance Agency that the turnover in personnel at said Sierra-Ordinance Depot was largely due to inadequate housing and that inadequate housing was the cause of morale and welfare problems; it was further represented to said Federal Housing Administration and Housing and Home Finance Agency that respiratory diseases have increased due to overcrowdedness in the housing area and that as many as nine persons in a family occupy a unit of approximately five hundred feet; it was further represented to said Federal Housing Administration and Housing and Home Finance Agency that to assure the insurability of housing to be constructed under the authority of the said National Housing Act, as amended, certain existing housing on said Sierra-Ordinance Depot would be modified to permit larger family units, relieving the overcrowdedness then existing in the housing on said Sierra-Ordinance Depot, and that a number of the

other existing housing would be destroyed and thereby make available civilian and military personnel to occupy the housing to be constructed under authority of said National Housing Act, as amended, and thus assure the return of any expenditures made by the said Federal Housing Administration and Housing and Home Finance Agency in connection with the insurance to be granted to any person agreeing to construct said housing on or near the said Sierra-Ordnance Depot.

XVIII.

That thereafter on, to wit, the 24th of October, 1951, the Secretary of the Army, acting in pursuance of his authority, certified to the Federal Housing Administration, that one hundred thirteen (113) family units in multiple family structures and twelve (12) single family structures were necessary to provide adequate rental housing for civilian and military personnel assigned to duty at said Sierra-Ordnance Depot, that such military installation was deemed to be a permanent part of the Department of the Army, and that there was no present intention to substantially curtail activities at such installation. It was further certified by said Secretary of the Army that the military and civilian personnel who were expected to occupy the said dwelling units and for whom said rental housing was intended, would be capable of paying the proposed monthly rentals per family unit as set forth in said certifications.

XIX.

That by virtue of the request of the Department of the Army, the said Housing and Home Finance Agency, with the approval of the Department of the Army, programmed one hundred fifty (150) family dwelling units for rental housing for the civilian and military personnel of said Sierra-Ordnance Depot, and to meet the housing needs of essential immigrant defense workers, including members of the Armed Forces, employed in or stationed at the Sierra-Ordnance Depot, and by reason thereof, the Federal Housing Administration, under authority of the said National Housing Act, as amended, agreed to insure any mortgages on said dwelling units.

XX.

Thereafter, by reason of the representations made by the Department of the Army and the commitment of the Federal Housing Administration to insure a mortgage in the amount of One Million One Hundred Thirteen Thousand Seven Hundred and no/100 Dollars (\$1,113,700.00), the plaintiff, Herlong Sierra Homes, Inc., filed its application, received approval, and thereafter undertook to construct one hundred twenty-five (125) dwelling units in accordance with specifications, plans and drawings issued and approved by the Department of the Army and Federal Housing Administration and in accordance with the provisions of said National Housing Act, as amended, and the rules and regulations promulgated thereunder. Plaintiff, Herlong Sierra Homes, Inc., agreed to reserve the completed dwelling units

for rent to civilian and military personnel of said Sierra-Ordnance Depot at approved rentals to be charged for said dwelling units as follows:

- 43 units at a rental of \$70.00 per month;
- 30 units at a rental of \$73.40 per month;
- 16 units at a rental of \$83.40 per month;
- 10 units at a rental of \$91.25 per month;
- 9 units at a rental of \$96.25 per month;
- 3 units at a rental of \$111.25 per month.

XXI.

That the plaintiff, Herlong Sierra Homes, Inc., obtained a mortgage loan from the Manufacturers Trust Company of New York in the sum of One Million One Hundred Thirteen Thousand Seven Hundred and no/100 Dollars (\$1,113,700.00), which said loan was to be refinanced by the Manhattan Savings Bank of New York and to be secured by a mortgage on said dwelling units and other property executed by plaintiff, Herlong Sierra Homes, Inc., and insured by the Federal Housing Administration; that said lending institutions were and are approved as such by the Federal Housing Administration.

XXII.

That the plaintiff, Herlong Sierra Homes, Inc., was approved by the said Federal Housing Administration as the mortgagor for said loan and thereafter fully complied with all of the conditions and requirements for the construction of said dwelling units and all of said dwelling units were completed and ready for occupancy in January, 1954.

XXIII.

That the plaintiff, Builders Corporation of America, by reason of the representations made by the Department of Defense and the commitment of the Federal Housing Administration to insure a mortgage of One Million Two Hundred Sixty-one Thousand Three Hundred Dollars (\$1,261,300.00) for the dwelling units programmed by the Housing and Home Finance Agency filed its application, received approval, and thereafter undertook to construct one hundred fifty (150) dwelling units in accordance with plans, specifications, and drawings issued and approved by the Department of Defense and Federal Housing Administration and in accordance with the provisions of the said National Housing Act, as amended, and the rules and regulations promulgated thereunder. Plaintiff, Builders Corporation of America, agreed to reserve the completed dwelling units for sale or rent to civilian and military personnel of said Sierra-Ordnance Depot at approved sales prices and that the rentals to be charged for said dwelling units were to be as follows:

- 5 units at a rental of \$65.00 per month ;
- 91 units at a rental of \$75.00 per month ;
- 54 units at a rental of \$85.00 per month.

XXIV.

That plaintiff, Builders Corporation of America, obtained a loan in the sum of One Million Two Hundred Sixty-one Thousand Three Hundred Dol-

lars (\$1,261,300.00) from the California Bank of Los Angeles, which said loan was to be purchased by the Federal National Mortgage Association and secured by a mortgage on the said dwelling units and other property executed by the plaintiff, Builders Corporation of America; that said Federal National Mortgage Association is authorized by law to purchase said mortgages and that said mortgage was insured by the Federal Housing Administration.

XXV.

That plaintiff, Builders Corporation of America, was approved by said Federal Housing Administration as the mortgagor for said loan and fully complied with all of the conditions and requirements for the construction of said dwelling units and said dwelling units were ready for occupancy in August, 1954.

XXVI.

That the total sum expended or obligated by plaintiff for the construction of said dwelling units amounted to the sum of Six Hundred Thousand Dollars (\$600,000.00), in addition to the sum of Two Million Three Hundred Seventy-five Thousand Dollars (\$2,375,000.00) obtained by plaintiff under said loans.

XXVII.

That on, to wit, the 23rd day of January, 1954, the Commanding General, Sixth Army, Department of Defense, acting within authority duly granted him, notified Colonel G. H. Leavitt then and there

the Commanding Officer of the Sierra-Ordnance Depot, that the housing constructed by plaintiffs was not being occupied by personnel of the Sierra-Ordnance Depot and directed said Commanding Officer to initiate and develop a co-ordinated and aggressive program to assure maximum occupancy.

XXVIII.

That on, to wit, the 28th day of April, 1954, the Commanding General, Sixth Army, Department of Defense, acting within the authority duly granted him, notified Colonel G. H. Leavitt then and there Commanding Officer of the said Sierra-Ordnance Depot, that no major difficulties in obtaining full occupancy of the dwelling units constructed by plaintiffs herein at said Sierra-Ordnance Depot was expected, and said Commanding General, acting under authority duly granted him, directed that in order to accellerate full occupancy of said dwelling units and to present maximum opportunity to those not able to afford the rents required to be paid for said dwelling units, income limitations commensurate with the size of the family to be established for those who were to be permitted to occupy the government housing. It was further directed that, in the event said action did not bring about the desired result, steps should be taken to demolish certain of the temporary housing units, as was initially agreed upon and considered when the dwelling units to be constructed by plaintiffs were authorized at said Sierra-Ordnance Depot.

XXIX.

That on, to wit, the 24th day of June, 1954, under authority of the Commanding General, Sixth Army, orders and directives were issued to Colonel G. H. Leavitt, then and there the Commanding Officer of the Sierra-Ordnance Depot, as follows:

(a) An income limitation (with a sliding scale for dependents) to be established above which military and civilian personnel at Sierra-Ordnance Depot would not be permitted to occupy present government housing.

(b) Notice to be served on all tenants of the government housing whose incomes were above the salary limit as directed that their quarters be vacated not later than the 1st day of September, 1954.

(c) Notice to be served on tenants of government housing who were not employees of the Department of the Army, but rendering services to the Sierra-Ordnance Depot that, unless there was some contract or operating agreement which guarantees these persons on post housing, to vacate their government housing not later than the 1st day of September, 1954.

(d) To select a total of one hundred twenty-five (125) sets of substandard family quarters for disposal.

XXX.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A.

Hoyt, and C. Q. Johnson, agents and employees of the defendant United States of America, knew that by reason of the isolated area in which said dwelling units constructed by plaintiffs were located, the only available occupants and tenants for said dwelling units were the military and civilian personnel for whom said rental units had been programmed, authorized, and constructed; that after completion of said dwelling units, the plaintiffs would be required to expend large sums of money for payment on the principal and interest on mortgages, taxes, and in operation and maintenance of the property; that without rental income from said dwelling units, plaintiffs would be unable to meet those obligations without great loss.

XXXI.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant, United States of America, acting within the scope of their respective offices and employment, with intention of damaging plaintiff's, deliberately, intentionally, and wilfully failed and refused to carry out the orders issued as aforesaid and failed and refused to initiate or implement any program to assure maximum occupancy of the dwelling units constructed by plaintiffs; failed and refused to establish income limitations for those who were to occupy the houses owned and operated by the defendant, United States of America, as part of the Sierra-Ordnance Depot; failed and refused to take

any action to demolish any of the temporary and substandard housing; and failed and refused to issue notices to those specified in said orders to vacate government housing not later than the 1st day of September, 1954.

XXXII.

That United States of America, Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and their respective offices and employment, and for the purpose of preventing and delaying compliance with the orders and directives heretofore alleged and to circumvent such orders and directives so as to prevent the military and civilian personnel from occupying said rental housing, did represent to the Commanding General, Sixth Army, and to the Federal Housing Administration and to the Housing and Home Finance Agency that plaintiffs had improperly constructed said housing in that there were, among others, the following structural defects:

Water Seepage through pumice block walls.

Nails working out of woodwork through plaster and painted interior walls.

Inadequate operation of washing machines, due to low water pressure.

Unsatisfactory operation of gas range burners.

Washing away of cement used with ceramic tile.

Porosity resulting in sand seeping in through cracks and around doors and windows at junctions of the ceilings and walls and exhaust areas over gas ranges.

Unsatisfactory floors.

Low water pressure, and dangerous conditions in case of fire by reason thereof.

Deficiencies in roads serving these dwelling units.

Inadequacy of gas space heating units.

Inadequate clothes lines and other structural defects.

That by reason of such structural defects, the military and civilian personnel could not live in said housing; that the plaintiffs were charging rentals in excess of the agreed rentals; that plaintiffs had imposed high utility costs;

that each and all of said representations were false and untrue and that Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant United States of America, and each of them, knew said representations were false and untrue, and were made by them, and each of them, for the sole purpose of circumventing the orders and directives issued by the Commanding General of the Sixth Army and justifying their disobedience of said orders; that said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope

of their authority and employment, made similar misrepresentations to the military and civilian personnel employed at Sierra-Ordinance Depot to induce, persuade, coerce, and entice said military and civilian personnel from moving into the dwelling units constructed by plaintiffs; that said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and employment, by threats and intimidation and abuse of the authority vested in them by virtue of their respective positions, sought to and did preclude and prevent said military and civilian personnel from moving into said dwelling units constructed by plaintiffs, and said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and employment, attempted to and did induce and incite the military and civilian personnel to interfere with the occupancy of said dwelling units, and of the rights and privileges granted by the United States to the plaintiffs.

XXXIII.

That by reason of the wrongful acts of the defendant, its employees and agents, plaintiffs incurred a loss in rental income and were otherwise damaged in the sum of Three Million Four Hundred Seventy-five Thousand no/100 Dollars (\$3,475,000.00).

Wherefore, plaintiffs pray for judgment in the amount of Three Million Four Hundred Seventy-five Thousand and no/100 (\$3,475,000.00), for costs of suit and for such other and further relief as to the court may seem proper.

Count II.

As and for a Second Cause of Action Plaintiffs
Allege:

I.

Plaintiffs reaffirm and especially refer to paragraphs I to XXX of the first cause of action herein set forth, and ask that they be taken as and made a part of this cause of action the same as if specifically set forth in haec verba.

II.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, agents of the defendant United States of America, acting within the scope of their respective offices and employment, carelessly and negligently failed and refused to carry out the orders issued as aforesaid, and carelessly and negligently failed and refused to initiate or implement any program to assure maximum occupancy of the dwelling units constructed by plaintiffs, and carelessly and negligently failed and refused to establish income limitations for those who were to occupy the houses owned and operated by the defendant, United States of America, as part of

the Sierra-Ordinance Depot; and carelessly and negligently failed and refused to demolish any of the temporary and substandard housing; and carelessly and negligently failed and refused to issue notices to those specified in said orders to vacate government housing not later than September 1, 1954.

III.

That Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, and each of them, acting within the scope of their authority and their respective offices and employment, inspected the dwelling units constructed by plaintiffs in so careless, negligent, and perfunctory manner and said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, relying on rumor and hearsay, represented to the Commanding General, Sixth Army, and to the Federal Housing Administration and to the Housing and Home Finance Agency that plaintiffs had improperly constructed said housing in that there were, among others, the following structural defects:

Water seepage through pumice block walls.

Nails working out of woodwork through plaster and painted interior walls.

Inadequate operation of washing machines, due to low water pressure.

Unsatisfactory operation of gas range burners.

Washing away of cement used with ceramic tile.

Porosity resulting in sand seeping in through cracks and around doors and windows at junctions of the ceiling and walls and exhaust areas over gas ranges.

Unsatisfactory floors.

Low water pressure, and dangerous conditions in case of fire by reason thereof.

Deficiencies in roads serving these dwelling units.

Inadequacy of gas space heating units.

Inadequate clothes lines and other structural defects.

That by reason of such structural defects, the military and civilian personnel could not live in said housing; that the plaintiffs were charging rentals in excess of the agreed rentals; that plaintiffs had imposed high utility costs.

That each and all of said representations were false and untrue; that said misrepresentations resulting from the careless and negligent inspection made by said Colonel G. H. Leavitt, Captain William K. Bouldin, Joseph H. Gill, Virgil Leigh, Herbert A. Hoyt, and C. Q. Johnson, were made also to the military and civilian personnel employed at said Sierra Ordnance Depot and as a proximate and direct result of said careless and negligent inspection and misrepresentations, said military and civilian personnel refused to rent or occupy the dwelling units constructed by plaintiffs.

IV.

That by reason of the negligent and careless acts of the defendant, its employees and agents, plaintiffs incurred a loss in rental income and were otherwise damaged in the sum of Three Million Four Hundred Seventy-five Thousand and no/100 Dollars (\$3,475,000.00).

Wherefore, plaintiffs pray for judgment in the amount of Three Million Four Hundred Seventy-five Thousand and no/100 (\$3,475,000.00), for costs of suit and for such other and further relief as to the court may seem proper.

Dated: June 24, 1955.

LANDIS AND BRODY,

By /s/ ALVIN LANDIS,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To: Landis and Brody, Attorneys at Law, Room 1108, 926 J Building, Sacramento 14, California:

Please Take Notice that on Monday, June 18, 1956, at 9:30 a.m. in the courtroom of the Master Calendar Judge, United States Courthouse and

Post Office Building, Sacramento, California, the defendant will move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action because the court lacks jurisdiction over the subject matter of the action pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C., Section 1346(b), 2671, et seq. (1952).

LLOYD H. BURKE,

United States Attorney;

By /s/ MARVIN D. MORGENSTEIN,

Assistant United States

Attorney.

Affidavit of mail attached.

[Endorsed]: Filed May 26, 1956.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This is an action to recover damages against the United States of America under the provisions of the Federal Tort Claims Act (28 U.S.C.A., §§ 2671, et seq., and § 1346(b)) for the alleged loss of anticipated rental income from dwelling units constructed by plaintiffs adjacent to the Sierra Ordnance Depot, a military installation of the United

States near Herlong, California. Plaintiffs allege that pursuant to a declared public policy of the United States to stimulate and encourage private construction of dwelling units to alleviate the acute housing shortages near federal military installations (Chapter 403, Public Law 211, 81st Congress, 1st Session [63 Stat. 570; 12 U.S.C.A. §§ 1748, et seq., as amended]), the Secretary of the Army on October 24, 1951, certified to the Federal Housing Administration that a need for housing facilities for base personnel of the Sierra Ordnance Depot existed. Plaintiffs further allege that thereafter the Federal Housing Administration, acting pursuant to statutory authority (12 U.S.C.A., §§ 1702, et seq., as amended), agreed to insure mortgages in the amount of \$1,113,700 on 125 dwelling units to be constructed by plaintiff, Herlong Sierra Homes, Inc., and to insure mortgages in the amount of \$1,261,000 on 150 dwelling units to be constructed by plaintiff, Builders Corporation of America, all of which said dwelling units were to be constructed adjacent to the Sierra Ordnance Depot. Plaintiffs further allege that the Commanding General of the Sixth Army issued an order to the Base Commander of the Sierra Ordnance Depot directing him to follow certain procedures set forth in the order for the general purpose of compelling base personnel to vacate the homes, in which they were then living, and become tenants of the plaintiffs "not later than September 1, 1954." It is alleged that the Base Commander failed and refused to carry out this order, and it is on this alleged failure

and refusal that plaintiffs seek to found their two causes of action. The first cause of action is predicated on the theory that the Base Commander refused to carry out the aforementioned order with the intent to injure plaintiffs' business interests, and prevent plaintiffs from entering into an anticipated business relationship with the base personnel. The second cause of action is predicated on the theory that the Base Commander's alleged failure to carry out the order and plan submitted to him was negligence which directly caused plaintiffs' loss of rental income. Damages in the sum of \$3,475,000 are sought on both causes of action.

Defendant has filed a motion to dismiss based, generally, on the contention that neither cause of action is cognizable under the provisions of the Federal Tort Claims Act, the alleged tortious conduct of the Base Commander having arisen in the course of exercising a "discretionary" function or duty (28 U.S.C.A., § 2680(a)). Defendant further contends, *inter alia*, that the first cause of action is grounded on the tort of interference with contractual relations within the meaning of Title 28 U.S.C.A. § 2680(h), and, hence, is barred by the exclusion provisions of the Act. Defendant contends that the second cause of action fails to state a claim in negligence for the reason that defendant owed no duty to plaintiffs to protect plaintiffs from the type of loss which they suffered.

The alleged wrongful act of the Base Commander for which plaintiffs seek a recovery under their first

cause of action appears to be the tort of "interference with prospective advantage" (Prosser on Torts, p. 745 [2d Ed., 1955]), sometimes labeled "interference with prospective contracts or business relations" (*Masoni vs. Board of Trade*, 119 Cal. App. 2d 738, 260 Pac. 2d 205). Since Congress has decided not to surrender the immunity of the United States from tort actions based on interference with contract relations (28 U.S.C.A., § 2680 (h)), the essential issue which this Court must decide, then, is whether the tort of interference with prospective advantage or prospective contracts is properly includable within the aforementioned exception to the Tort Claims Act. It would seem to be quite illogical to conclude that Congress intended to exclude one tort from the operation of the Act, and, at the same time, waive the Government's immunity from actions sounding in a substantially identical tort; the distinction between the two being one of degree, only, in the elements necessary to establish liability.¹ Congressional intent need not be further pondered, however, for under the substantive tort law of California, by which we are bound in this case (cf. *Massachusetts Bonding Co. vs. United States*, 352 U. S. 128), no distinction be-

¹Both the tort of interference with contract relations and the tort of interference with prospective contract or business relations involve basically the same conduct on the part of the tortfeasor. In one case the interference takes place when a contract is already in existence, in the other, when a contract would, with certainty, have been consummated but for the conduct of the tortfeasor. (See Prosser on

tween "interfering with contract relations" and "interfering with prospective contract or business relations" is recognized except in the factual situations which are considered essential to the existence of liability for the substantive tort of "interference."² Thus, in *Masoni vs. Board of Trade*, *supra*, at p. 741, it was stated:

"Actionable interference of this kind is not limited to inducing breach of an existing contract or other wrongful conduct but comprises also unjustifiably inducing a third person not to enter into or continue a business relation with another." (Citing the Restatement of Torts, § 766(a) and (b).)

(See also: *Campbell vs. Rayburn*, 129 Cal. App. 2d 232; *Guillory vs. Godrey*, 134 Cal. App. 2d 628; *Wilson vs. Loew's, Inc.*, 142 A.C.A. 191; and 28 Cal. Jur. 2d 427, *Interference*, §§ 7 and 8.)

Few federal cases have dealt with the exclusion of interference with contract relations from federal

Torts. pp. 720, et seq., and pp. 745, et seq. [2d Ed. 1955]). Rather than characterizing the two as separate torts, the more rational approach seems to be that the basic tort of interference with economic relations can be established by showing, *inter alia*, an interference with an existing contract or a contract which is certain to be consummated, with broader grounds for justification of the interference where the latter situation is presented.

²Note 1, *supra*.

tort liability,³ but the case of *Fletcher vs. Veterans Administration*, 103 F. Supp. 654 [E. D. Mich.], provides a helpful analogy. In that case plaintiff operated a school supported primarily by veteran enrollees, but the Veterans Administration, for undisclosed reasons, thereafter advised the veterans against enrolling in the school with the result that plaintiff was left with empty classrooms, and was forced to discontinue his operations. The ensuing

³Only two have been found, *Nicholson vs. United States*, 177 F. 2d 768, and *Fletcher vs. Veterans Administration*, 103 F. Supp. 654. The *Nicholson* case held merely that an action between two parties to a contract for injuries caused by the negligence of one, was not an action for interference with contractual relations. The *Fletcher* case is discussed in the main text.

Plaintiffs contend that the case of *Oman vs. United States*, 179 F. 2d 738, is determinative of the question. In that case, the Court permitted the plaintiff to maintain an action against the United States for damages arising out of the government's permitting third persons to invade plaintiff's exclusively granted grazing territory on the public domain. The principal question before the Court in that case was whether the action was barred by the discretionary function exception in Title 28, U.S.C.A., § 2680(a), the Court holding that the government agents had no discretion to pursue a course of conduct tantamount to a revocation of plaintiff's exclusive grant without employing the established procedure to effect such a revocation. The action clearly was not based on the tort of interference with contract relations, but was more closely akin to an action in the nature of trespass. With facts so materially different, the holding in the *Oman* case was clearly not addressed to the issue before the Court in the case at bar.

action against the Veterans Administration for "negligence" in causing the loss of existing and future business opportunity was dismissed as an action based on interference with contract rights within the meaning of § 2680(h), Title 28, U.S.C.A.

In view of the foregoing authorities, this Court is of the opinion that the United States did not waive its immunity from the type of claim which plaintiffs assert by their first cause of action, hence, no useful purpose would be served by here ruling on defendant's contention that this cause of action is likewise barred under the "discretionary function" exception enunciated in § 2680(a), *supra*.

In order to recover damages on their second cause of action, based on negligence, it is essential that plaintiffs allege and prove that defendant owed them a duty to conform to a standard of conduct which would prevent the kind of injury which plaintiffs allegedly suffered. This is the rule in California (*Routh vs. Quinn*, 20 Cal. 2d 488), and is likewise applicable to actions based on negligence under the Federal Tort Claims Act (*The Dalles City vs. River Terminals Company*, 226 F. 2d 100; *Social Security Admin. Baltimore F.C.U. vs. United States*, 138 F. Supp. 639; *Mid-Central Fish Co. vs. United States*, 112 F. Supp. 792, *aff'd* 210 F. 2d 263; and *Anglo-American and Overseas Corp. vs. United States*, 144 F. Supp. 635).

What the scope of duty is in any given case seldom admits of easy definition. Perhaps the most

helpful analysis is tendered by Dean Prosser in his treatise on torts, where he states:

“The statement that there is or is not a duty begs the essential question—whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” (Prosser on Torts, p. 167 [2d Ed. 1955].)

Plaintiffs’ contentions in this regard are based essentially on a theory that Congress, by enacting laws designed to encourage the construction by private businesses of dwelling facilities near military installations, intended to create a duty on the part of the commanding officers of such installations to provide the owners of such housing facilities with tenants so that their investment would be a profitable one. However, an analysis of the statutory provisions (12 U.S.C.A., §§ 1748, et seq.), and their legislative history (House Report No. 854, 81st Congress, 1st Session, June 20, 1949) yields a different conclusion. Of basic concern to Congress was the critical need for adequate housing and living facilities around vital defense installations and the possibility of serious consequences to personnel morale arising from undesirable living conditions. To implement the program designed to alleviate this situation, Congress determined that the desired results could best be obtained by the encouragement of the private construction industry to undertake the building projects. Such an undertaking for the Federal Government, it was decided, would be too costly and otherwise unfeasible. Government intervention

was, hence, limited to assisting the private construction industry in obtaining the necessary financing by insuring their indebtednesses through the Federal Housing Administration. No duty, however, was placed on the Government to insure the financial success of the private projects; to the contrary, Congress acknowledged a duty only in developing the defense effort to its fullest potential, and recognized that the morale of defense personnel was an indispensable factor in bringing about the success of the program.

If plaintiffs are to rely on the existence of a statutory duty, it is essential that they show that the statute is designed for their benefit, or for those of a class of which they are members (*Anglo-American and Overseas Corp. vs. United States*, supra; *Social Security Admin. Baltimore F.C.U. vs. United States*, supra; *Mid-Central Fish Co. vs. United States*, supra; and *Routh vs. Quinn*, supra). No such showing is made by plaintiffs in this case.

Before a duty can be said to exist, even in the absence of statute, the plaintiff in a negligence action must show that his injury occurred as a result of the invasion by the defendant of a legally protectable interest. Plaintiff has alleged, at best, the deprivation of an expectancy only,⁴ and while a

⁴The cases of *Smith vs. United States*, 113 F. Supp. 131, and *Oman vs. United States*, supra, note 4, are not helpful to plaintiffs' position in this connection. Both of these cases involve tangible, existing legal interests, and are addressed to the discretionary function exception to the Tort Claims Act.

definite business expectancy may be considered a protectable interest in a proper case, the Court has already concluded that the Tort Claims Act does not contemplate actions based on interference with business expectations. These fatal defects in the plaintiffs' complaint render the second cause of action likewise subject to a motion to dismiss.

For the reasons above set forth plaintiffs' complaint and each of the causes of action attempted to be set forth therein are, and each of them is, hereby dismissed. Let a judgment in favor of the defendant be entered herein on each of the causes of action attempted to be set forth in plaintiffs' complaint. Defendant will prepare and lodge with the Clerk of this Court all papers and documents necessary for the final disposition of this case.

Dated: February 19, 1957.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed February 19, 1957.

To hold that one who assists another in financing the construction of rental facilities owes a concomitant duty to the other (in the absence of statute or contract) to assist him in acquiring tenants would be to create a novel and heretofore unprecedented substantive tort liability for a private citizen as well as the government. This Court declines the invitation to create such a duty.

In the United States District Court for the Northern District of California, Northern Division

Civil No. 7250

BUILDERS CORPORATION OF AMERICA, a
Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action came on regularly for hearing on defendant's motions to dismiss on July 16, 1956, before the Court, Honorable Sherrill Halbert, United States District Judge, presiding. Alvin Landis, Esq., appeared for plaintiffs and Lloyd H. Burke, Esq., United States Attorney, by Marvin D. Morgenstein, Esq., Assistant United States Attorney, appeared for defendant.

Defendant's motions having been submitted for decision upon briefs and oral argument, and the Court, on February 19, 1957, having made and entered its order that the complaint, and each of the causes of action attempted to be set forth in the complaint are dismissed.

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs take nothing by their complaint; that

defendant's motion to dismiss Count One of the Complaint for lack of jurisdiction and Count Two of the Complaint for failure to state a claim are granted; that plaintiffs' complaint and each of the causes of action attempted to be set forth therein are dismissed in accordance with Rule 41(b) of the Federal Rules of Civil Procedure; and that costs are awarded to defendant in the amount of \$20.00.

Dated: March 12th, 1957.

/s/ SHERILL HALBERT,
United States District Judge.

Affidavit of Mail attached.

Lodged March 2, 1957.

[Endorsed]: Filed March 12, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Builders Corporation of America, a corporation, and Herlong Sierra Homes, Inc., a corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order entered February 19, 1957, dismissing plaintiffs' complaint and from the final judgment entered in this action on March 12, 1957.

Dated: March 28, 1957.

LANDIS, BRODY & MARTIN,

By /s/ ALVIN LANDIS,
Attorneys for Appellants, Builders Corporation of
America, a Corporation, and Herlong Sierra
Homes, Inc., a Corporation.

[Endorsed]: Filed April 4, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1955

June 2—Filed complaint, issued summons.

Aug. 12—Filed summons on ret. unex., at the request of the attorney for the plaintiffs.

1956

Feb. 23—Issued alias summons.

Mar. 2—Filed alias summons on ret. ex., 2-27-56.

Apr. 23—Filed stip. ex. time to plead.

May 26—Filed notice of motion to dismiss.

June 6—Filed memo of points & authorities in support of motion to dismiss.

June 18—Ord. case con. to July 16th, 1956, for hearing on motion to dismiss.

July 9—Filed memorandum in opposition to motion to dismiss.

July 16—Hearing; Ord. U. S. have 5 days to file closing memo. Case con. to July 30th, 1956, for further proceedings.

1956

- July 30—Ord. case con. to Sept. 17th, 1956, for further proceedings.
- Sept. 17—Ord. case con. to Oct. 15th, 1956, for further proceedings.
- Oct. 15—Ord. case con. to Nov. 13th, 1957, for further proceedings.
- Nov. 13—Ord. case con. to Dec. 10th, 1956, for further proceedings.
- Dec. 10—Ord. case con. to Feb. 18th, 1957, for further proceedings.

1957

- Feb. 18—Ord. motion to dismiss submitted.
- Feb. 19—Ord. motion to dismiss granted, and that judgment be entered herein in favor of defendant. Filed memorandum & order. Mailed copies.
- Mar. 2—Lodged proposed judgment.
- Mar. 12—Filed judgment in favor of defendant and against plaintiff, with costs in the sum of \$20.00.
- Mar. 12—Entered judgment (Filed March 12th, 1957). Mailed notices to attorneys.
- Apr. 4—Filed notice of appeal. Mailed notice to U. S. Attorney. Filed cost bond on appeal.
- Apr. 9—Filed designation of contents of record on appeal.
- Apr. 24—Made Record on Appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal here as designated:

1. Complaint.
2. Notice of motion to dismiss.
3. Memorandum and order.
4. Judgment.
5. Notice of appeal.
6. Cost bond on appeal.
7. Designation of the contents of the record on appeal.
8. Docket entries.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 24th day of April, 1957.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 15533. United States Court of Appeals for the Ninth Circuit. Builders Corporation of America, a Corporation, and Herlong Sierra Homes, Inc., a Corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed April 25, 1957.

Docketed April 29, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15533

BUILDERS CORPORATION OF AMERICA,
a Corporation, and HERLONG SIERRA
HOMES, INC., a Corporation,
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant and Appellee.

APPELLANTS' STATEMENT OF POINTS

Appellants, plaintiffs in the above-entitled action, intend to rely upon the appeal of the above-entitled action upon the following points:

1. The complaint sets forth a good cause of action under the Federal Tort Claims Act, Title 28, U. S. Code, Sections 2671, et seq., and Title 28, U. S. Code, Section 1346(b).
2. The District Court erred in sustaining the defendant's motion to dismiss the complaint.
3. The District Court erred in entering judgment in favor of the defendant upon the motion to dismiss filed by the defendant.

Dated: May 6, 1957.

LANDIS, BRODY & MARTIN,
Attorneys for Appellants.

[Endorsed]: Filed May 7, 1957.